

APPEAL NO. 042504
FILED NOVEMBER 15, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 18, 2004. The hearing officer determined that: (1) the _____, compensable injury of the respondent/cross-appellant (claimant) does extend to include a herniated nucleus pulposus (HNP) of the lumbar spine; (2) the appellant/cross-respondent (carrier) waived its right to contest the compensability of the HNP by not timely contesting compensability of the injury in accordance with Sections 409.021 and 409.022; (3) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. R on December 22, 2003, did not become final under Section 408.123; and (4) claimant did not have disability resulting from the _____, compensable injury. Carrier appealed the determinations regarding extent of injury, carrier waiver, and finality under the 90-day rule on sufficiency grounds. Claimant appealed the disability determination and contends that he had disability after March 10, 2004. Carrier responded that the disability determination should be affirmed. The file does not contain a response from claimant.

DECISION

We affirm in part and reverse and remand in part.

Carrier contends the hearing officer erred in determining that HNP of the lumbar spine is causally related to the compensable injury of _____, and that the compensable injury did extend to include the HNP of the lumbar spine. Claimant was initially diagnosed with a back strain. In November 2003, he was diagnosed with radicular symptoms. Dr. R stated that there was no "hard correlation" between any herniated disc and claimant's symptoms or clinical findings. Dr. H stated that claimant had an L6-S1 herniation and symptoms along the left S1-S2 distribution. There was no MRI report or other medical evidence showing that any herniation was a preexisting condition, though Dr. H did state that claimant had "multiple re-aggravations" and repeat injuries. We have reviewed the complained-of determination regarding extent of injury and conclude that the issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We note that the aggravation of a preexisting condition may be a compensable injury in its own right provided there has been some enhancement or acceleration of the prior condition and not the mere recurrence of symptoms. We conclude that the hearing officer's determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier contends the hearing officer erred in determining that: (1) carrier waived its right to contest the compensability of the HNP; and (2) carrier failed to actively investigate the nature and extent of the claimed injury of _____, within 60

days of its receipt of written notice of the injury. The hearing officer determined that the HNP of the lumbar spine was diagnosed and documented prior to the date, November 14, 2003, when carrier first received notice of the claimed injury. Carrier did not contest the compensability of the HNP diagnosis until June 18, 2004. The compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. Texas Workers' Compensation Appeal No. 041738-s, decided September 8, 2004. Claimant was diagnosed with "disc displacement lumbar with myelopathy" on October 31, 2003, and an MRI report of November 6, 2003, stated that claimant has an HNP at L6-S1. In the instant case, the carrier could have discovered the HNP and contested the compensability of the injury well within the waiver period. As such, the hearing officer did not err in determining that the carrier had waived its right to contest compensability of the HNP of the lumbar spine.

Carrier contends the hearing officer erred in determining that the first certification of MMI and IR by Dr. R did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12). Carrier asserts that claimant did not timely dispute this certification. The hearing officer determined that there is no "verifiable evidence to show that claimant received written notice" of the certification more than 90 days prior to claimant's April 5, 2004, dispute of Dr. R's certification. There is no evidence in the record of provision/delivery of written notice of Dr. R's certification through verifiable means. There is nothing to show that notice was provided from a source in a manner that reasonably confirmed delivery to claimant. See Texas Workers' Compensation Commission Appeal No. 041985-s, decided September 28, 2004. We conclude that the hearing officer did not err in determining that Dr. R's certification of MMI and IR did not become final.

Claimant contends the hearing officer erred in determining that he did not have disability due to the _____, injury. Claimant asserts that he met his burden to prove that he had disability after March 10, 2004, when he was terminated for cause. Claimant asserts that, because he had continuing work restrictions, he had disability.

Dr. R, the referral doctor who was treating claimant, returned claimant to full duty on December 16, 2003. On February 13, 2004, claimant returned to Dr. R with increased pain and was placed on restricted duty. Dr. R said claimant should follow up with Dr. W. On February 26, 2004, Dr. R. extended the period of restricted duty and increased the restrictions. Claimant had continued working on restricted duty, though he said he had difficulty with pain and the effects of medications. On March 10, 2004, claimant's employment was terminated for cause.

In the decision and order, the hearing officer relates that claimant had been on modified duty prior to his termination for cause on March 10, 2004. She states that the claimant "failed to demonstrate that the wages he earned while working modified duty were less than his preinjury wage." The hearing officer did not otherwise explain the disability determination.

In Texas Workers' Compensation Commission Appeal No. 980003, decided February 11, 1998, we cited Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, and said:

It is our opinion that a broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause . . . has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury. While virtually all case authority holds that the reason for the termination must be justified or for a just cause, the result of the injury remains and may prevent any or very limited gainful employment at all. Therefore, we are convinced that an approach to this issue which also factors in the continuing effect of the injury on the capacity to obtain and retain some gainful employment is more in keeping with the 1989 Act, the intent and purposes of workers' compensation, and is fairer to all parties.

* * * *

If and when an injured employee, who is terminated for cause, can sufficiently establish that the work-related injury is precluding him or her from obtaining and retaining new employment at preinjury wage levels, temporary income benefits once again become payable.

In Texas Workers' Compensation Commission Appeal No. 94697, decided July 13, 1994, the Appeals Panel affirmed the hearing officer's determination that the employee had disability in circumstances where the employee had returned to light-duty work within her restrictions following carpal tunnel surgery, until she was discharged following a dispute over bereavement leave. Claimant testified that she had right hand and arm pain, that the doctor had instructed her not to use her right upper extremity, and that she had been offered jobs at a store and a bar but felt she could not do the work. The hearing officer determined that the claimant in that case reestablished disability as a result of her compensable injury from February 25, 1994, the date of her termination, to the date of the hearing. The carrier had contended that the termination was the sole cause for her inability to work. The Appeals Panel noted that there was no medical evidence that the employee was released to full duty, that she was terminated from a light-duty position, not from regular duty, that she testified she could not perform regular duty, and that, consequently, it became a factual determination as to whether the employee could obtain and retain regular employment. The Appeals Panel cited cases for the proposition that while involuntary termination can be a factor, it is not necessarily controlling, and that the focus is on the ability to obtain and retain employment. The decision stated that even if employment termination may have been for cause, that fact does not, in and of itself, foreclose the existence of disability and that the hearing officer must look to see if the inability to obtain and retain employment is due to the termination or to the continuing effect of the injury.

The hearing officer's stated rationale for finding that claimant did not have disability after March 10, 2004, is not a basis for finding that claimant did not have disability. Therefore, we must reverse the hearing officer's disability determination and remand the case for reconsideration of the disability issue based on the evidence before her in the record. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

We affirm that part of the hearing officer's decision that determined that the _____, compensable injury extends to include a HNP of the lumbar spine. We affirm that part of the hearing officer's decision that determined that the certification of MMI and IR by Dr. R did not become final. We reverse that part of the hearing officer's decision and order that determined that claimant does not have disability and we remand for further proceedings consistent with this decision.

According to information provided by carrier, the true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Veronica L. Ruberto
Appeals Judge